In The

Supreme Court of the United States

October Term, 1975

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No. 74-1263

—o—

LOU V. BREWER, Warden of the Iowa State Penitentiary at Fort Madison, Iowa,

Petitioner,

vs.

ROBERT ANTHONY WILLIAMS, a/k/a ANTHONY ERTHEL WILLIAMS,

Respondent.

—o—

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

—o—

REPLY BRIEF OF PETITIONER

—o—

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TABLE OF AUTHORITIES

Cases:

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ARGUMENT

I.

Respondent misstated what he said about talking to the police in the presence of his lawyer.

Respondent's statement of the facts is for the most part accurate. But he misstates the record on at least one point which could mislead the Court. At page 5 of Respondent's Brief, he says that Lieutenant Ackerman of the Davenport police department "did not question [Williams]

after Respondent indicated that he did not wish to make any statement in the *absence of Mr. McKnight* (App. 42-43, 45)." (Emphasis added.)

The actual statement by Lieutenant Ackerman was that "[Williams] didn't wish to say anything because—until he *talked* to his attorney in Des Moines." (A. p. 43). (Emphasis added.)

The inference suggested by Respondent is that Williams said that he would talk to the police only if and while his attorney was present, and not in his absence. But the record does not support this inference. According to Lieutenant Ackerman, Williams wanted to talk with his lawyer in Des Moines before making any statements to the police. Thereafter, Williams *did* talk to his lawyer by telephone and was advised, among other things, that he would have to tell the police the location of the body:

> "A. Well, I heard him say that, 'You have to tell the officers where the body is,' and he repeated a second time, 'You have got to tell them where she is.' He then said, 'It makes no difference, you have got to tell them, you have already been on national hook-up.' He said, 'What do I mean by national hook-up? I mean you have been on television nationally, so that makes no difference. You have got to tell them where she is.'" (A. 96).

Respondent relies on this misstatement of fact at several places in his brief. See Respondent's Brief pp. 5, 15, 22, 32 (footnote 15), 40 and 49. Understandably, Respondent is attempting to bolster his arguments but the truth does not support them.

II.

The issue of voluntariness is before this Court.

Respondent Williams, in Division I of his brief, contends Petitioner has not appealed the finding of Judge Hanson that his statements were involuntary. This just isn't true.

Repeatedly throughout Petitioner's brief Petitioner argues that Williams' statements "were purely voluntary and untainted by the slightest coercion" (P. 15); "spontaneous or *voluntary*" (P. 16); were "not subject to psychological interrogation" or "physically threatened" or "run through menacing police interrogation procedures" (P. 19); "not physically abused" (P. 20); Williams "*freely* directed the police to the little girl's body" (P. 21); "Williams' statements simply were not 'compelled' they were volunteered" (P. 21).

Division V, commencing at page 37 of Appellant's (Brewer's) brief in the United States Court of Appeals for the Eighth Circuit, is devoted entirely to appealing Judge Hanson's decision on voluntariness. The Circuit Court decided only the waiver issue and that Williams was denied the right to counsel (App. A, Pet. for Writ, pp. A14 and A15). It did not address the voluntariness issue. That issue was, and remains, one of the primary issues of this case. It is implicit in the petition for writ of certiorari which was granted by this Court. There are simply no facts upon which Judge Hanson could reasonably conclude that Respondent Williams' acts and statements were involuntary. Nor is there any way in which Petitioner could do more to challenge Judge Hanson than he has

done, except to jump up and down, tear his hair and scream. Petitioner has even gone so far as to ask this Court to reconsider and overturn the new voluntariness requirements of *Miranda v. Arizona,* 384 U. S. 436 (1966) to allow trickery and deceit.

Petitioner not only raised the voluntariness issue, he suggested that this Court adopt the standards of Title 18 U. S. C. § 3501, Omnibus Crime Control and Safe Streets Act of 1968, or similar standards to determine voluntariness of self-incriminating statements. Petitioner's Brief, p. 23.

Even if Respondent is serious in this argument, he has raised the issue too late. Rule 24 (1), Rules of the Supreme Court, provides that Respondent must, in his brief in opposition to a petition for writ of certiorari, disclose any matter or ground why the cause should not be reviewed by this Court. In *Weiner v. United States,* 357 U. S. 349 (1958) this Court refused to consider an issue raised by the government because the government did not comply with Rule 24 (1) in its response to the Petition for Certiorari. Cf. *Cheever v. Wilson,* 9 WALL. 108, 19 L. Ed. 604 (1870); *The Camanche v. The Coast Wrecking Company of New York (The Camanche),* 8 WALL. 448, 19 L. Ed. 397 (1869). If, as Respondent suggests on page 11 of his brief, Petitioner's failure to raise the voluntariness issue after Judge Hanson was affirmed, "disposes of the entire case and requires reversal of Respondent's conviction" he should have pointed that out in timely fashion in Resistance to the Petition for Certiorari.

Even assuming this Court determines that we have not strictly complied with Rule 23 (1), Rules of the Supreme

Court, this Court has broad discretion to determine the issue of voluntariness on the merits. Certainly, Respondent can claim no surprise and he would not be adversely affected by a decision on the merits. This is not a case in which the issue was never presented. Voluntariness is inseparable from the other questions herein.

This Court has always attempted to resolve the ultimate issues of a case even if not presented by the parties. In the landmark case of *Erie R. Co. v. Tompkins,* 304 U. S. 64 (1938), this Court overruled a prior decision of years standing although neither party urged such a holding. The Court has inherent power to determine a case upon issues never discussed in any Court that considered the case. In *Terminiello v. Chicago,* 337 U. S. 1 (1949) the dissents of Justices Vinson and Frankfurter point out that the majority decided the case on an issue that was not raised in the trial court, in two Illinois appellate courts, in the petition for certiorari or the briefs in the Supreme Court, and was explicitly disclaimed on behalf of the petitioner at the bar of this Court.

The question of voluntariness is crucial to the final adjudication of this case. The Court has consistently confronted such important issues even where the rules were not strictly observed. *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, et al.,* 402 U. S. 313 (1971); *United States v. Arnold Schwinn and Co.,* 388 U. S. 365 (1967); *Boynton v. Virginia,* 364 U. S. 454 (1960); *Duignan v. United States,* 274 U. S. 195 (1927); *Cheever v. Wilson, supra.*

III.

Respondent's incriminating statements and acts were spontaneously volunteered and not in response to police interrogation.

At page 40 of Respondent's Brief, Respondent suggests that Williams was "interrogated" in the sense contemplated by this Court in *Miranda v. Arizona,* 384 U. S. 436 (1966). Respondent points to the "Christian burial" speech of Detective Leaming (App. 81) and subsequent questions by Detective Leaming and Detective Nelson *after* Williams initially stated to the Detectives (without prompting by the officers) (1) "Did you find her shoes?", (2) "Did you find the blanket?", and (3) "I am going to show you where the body is." (App. 72, 81-82, 99-100).

In reply to Respondent's assertion that Williams was "interrogated," Petitioner wishes to submit that (1) there was no "custodial interrogation" as contemplated by this Court in *Miranda* preceding the statements made by Williams to the officers, (2) the statements by Williams were *volunteered* to the officers and thus not proscribed by *Miranda, see,* 31 A. L. R. 3rd 565, 676-680 (1970), and (3) that any subsequent questions by the officers *after* Williams' initial statements were merely designed to pursue the line of inquiry begun by Williams, and which were also not proscribed by *Miranda.* See, *United States v. Hopkins,* 433 F. 2d 1041 (5th Cir. 1970); *Smith v. Peyton,* 295 F. Supp. 1379 (E. D. Va. 1968); *United States v. Pauldino,* 482 F. 2d 127 (7th Cir. 1973).

Miranda defines "custodial interrogation" as "questioning *initiated by law enforcement officers* after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. *Miranda v. Arizona,* supra, 384 U. S. at 444. It is elementary under this definition that statements made by an accused *not in response to any questions by the police* are not made during "custodial interrogation." The *Miranda* holding does not apply to statements or confessions *volunteered* to police officials. The *Miranda* Court first stated: "We deal with the admissibility of statements obtained from an individual who is subjected to custodial police interrogation." *Miranda v. Arizona, supra,* 384 U. S. at 439. Later the Court states:

> "Any statement given freely and voluntarily without any compelling influence is, of course, admissible in evidence.
>
> . . .
>
> "Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today." *Miranda v. Arizona, supra,* 384 U. S. at 478.

The record in this case demonstrates, contrary to Respondent's assertion, either that (1) there was no "custodial interrogation" of Williams at all prior to the time he made the above statements to the authorities, or (2) that if the "Christian burial" speech did amount to "interrogation," that such speech was made early during the trip to Des Moines (A. 63, 104) and that Williams' statements were subsequently *volunteered* at least two hours after Leaming's "Christian burial" statement (A. 63, 81 and 104). Thus, it cannot reasonably be argued that the statements were in response to "questioning initiated by law enforcement officers."

CONCLUSION

Respondent's misstatement of an important fact leads to an improper inference that Williams would talk to the police only in the presence of his lawyer.

The issue of whether Williams' statements and acts were voluntary is before the Court.

Respondent's initial incriminating statements concerning the whereabouts of the victim's shoes, blanket, and ultimately the location of her body were volunteered. These statements were not made in response to police interrogation. Any subsequent questions by the officers after Williams' volunteered statements were merely to pursue the line of inquiry begun by Respondent.

Respectfully submitted,

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Attorneys for Petitioner

CERTIFICATE OF SERVICE

I, Richard N. Winders, Assistant Attorney General for the State of Iowa, hereby certify that on the 28th day of September, 1976, I mailed three (3) printed copies of REPLY BRIEF OF PETITIONER, correct 1st class postage prepaid, to:

Mr. Robert Bartels
University of Iowa
College of Law
Iowa City, Iowa 52242

I further certify that all parties required to be served have been served.

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